Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,
Petitioners,
v.
RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, ET AL.
Respondents.

VALERIA TANCO, ET AL.,
Petitioners,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.
Respondents.

APRIL DEBOER, ET AL.,
Petitioners,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.
Respondents.

GREGORY BOURKE, ET AL.,
Petitioners,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* TEXAS EAGLE FORUM AND STEVEN F. HOTZE, M.D., IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

These consolidated cases present the following questions:

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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NOS. 14-556, 14-562, 14-571, 14-574
(CONSOLIDATED)

IN THE SUPREME COURT OF THE UNITED STATES

JAMES OBERGEFELL, *ET AL.*,

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v.

RICHARD HODGES, DIRECTOR,
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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INTEREST OF *AMICI CURIAE*

Amicus curiae Texas Eagle Forum[1] is a nonprofit organization that was founded in 1975 and incorporated in 1989, and is headquartered in Dallas, Texas. The mission of Texas Eagle Forum is to enable conservative and pro-family Texans to

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[1] *Amici* file this brief with the consent of all parties. The respondents all lodged blanket letters of consent with the Clerk, and *amici* have lodged the petitioners' written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amici* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amici* and its counsel – contributed monetarily to preparing or submitting the brief.

participate in the process of self-governance and public policy-making, in the hope that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise. Texas Eagle Forum has consistently defended the marriage provision in the Texas Constitution, which establishes that marriage shall be the union of only one man and one woman.

Amicus curiae Steven F. Hotze, M.D., a lifelong resident of Texas, is the founder and chairman of the Conservative Republicans of Texas, which is aligned with a majority of the Texas legislature. Dr. Hotze has been an active leader in Texas politics for more than three decades, and was an outspoken supporter of the Texas Marriage Amendment that establishes marriage as the union of only one man and one woman. The Texas Marriage Amendment passed by 76% of the vote as Proposition 2 in 2005, but a decision rendered by this Court in these marriage cases could seek to undermine Texas law.

For the foregoing reasons, *Amici* have a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The Court considers, in these consolidated cases, whether there is a constitutional right to homosexual marriage. Plaintiffs, who are same-sex couples or surviving partners of same-sex couples from Kentucky, Michigan, Ohio, and Tennessee, seek a federal court ruling to compel these states to perform homosexual marriages or fully recognize similar

marriages that were performed elsewhere. Current law limits marriage to the union of only a man and a woman in these states. *See* KY. CONST. §233A; KY. REV. STAT. §§402.005, 402.040(2), 402.020(1)(d), 402.045(1); OHIO CONST. art. XV, §11; OHIO REV. CODE ANN. §101.01(C); MICH. CONST. art. 1, §25; MICH. COMP. LAWS §§551.1, 551.2, 551.3, 551.4, 551.271, 551.272; TENN. CONST. art. 11, §18; TENN. CODE ANN. § 36-3-113.

SUMMARY OF ARGUMENT

A ruling to create a new constitutional right to homosexual marriage would be extraordinarily divisive to our Nation, mostly along regional lines. The People of Texas, for example, voted by a margin of 76-24% to limit marriage only to one man and one woman. Other southern states, such as South Carolina, cast similar votes in adopting laws against homosexual marriage. Their viewpoint does not arise from prejudice, but from clear teachings in the Bible, both Old and New Testaments, which will remain long after the decision in these cases. Our Nation could easily fracture into regional social conflict if the Court attempts, as it did in *Dred Scott*, to impose its own provincial view of a fundamental social issue on the entire country.

The Court's ruling in *Roe v. Wade* failed to unify the Nation on abortion, and a ruling for homosexual marriage would be even more divisive because marriage requires public support in order to work. Must private schools employ teachers who have

homosexual marriages that are fundamentally opposed by parents in the community? Must Christian bakers, photographers, and other businesses be compelled to serve homosexual marriage? So far there have been sparks of conflict on these issues in some regions. But a full conflagration could result with respect to Texas and similar regions if compelled by a split decision of this Court to embrace homosexual marriage.

Already, regional conflict has occurred based on federal court rulings that impose homosexual marriage. Governors in the northeast, specifically Connecticut, New York and Vermont, and the governor of Washington State, all banned official travel to Indiana to punish it for a new law there. So did the mayors of New York City, San Francisco, Denver, Portland, Seattle and Washington, D.C. The Indiana law was passed in response to a federal court ruling that Indiana must perform homosexual marriages, which inevitably subjects businesses to lawsuits if they decline to provide services to the new type of marriage with which they fundamentally disagree. After other regions of the Nation retaliated against Indiana for protecting opponents of homosexual marriage, the Indiana governor began looking for some middle ground to appease both sides. But there is no middle ground on whether businesses, schools, and churches will be compelled to accept homosexual marriage. Either a photographer must take pictures at such a wedding, or he need not. In the absence of middle ground,

regional conflict would inevitably result from a nationwide order to accept homosexual marriage.[2]

If the Court imposes homosexual marriage on Texas and other southern states, then at a minimum they will also take steps to protect their Christian businesses, schools and churches. Will northeastern and West Coast states then try to punish Texas, just as they have acted against Indiana? Hardly anyone should be surprised if that results. But Texas can defend itself, and balkanization will result.

Our Nation survived, but at an enormous cost, this Court's misguided attempt to impose its views on the entire country in *Dred Scott*. This Court should avoid analogous overreaching here.

ARGUMENT

I. CREATION OF A NEW CONSTITUTIONAL RIGHT TO HOMOSEXUAL MARRIAGE WOULD BALKANIZE OUR NATION, WHICH THE COURT SHOULD AVOID.

A fundamental principle that has guided the Framers and the Court is the avoidance of dividing

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[2] Within a few days, Indiana passed a revision to its law in response to the pressure, thereby postponing to another time a full standoff between different states on this issue. *See* Tony Cook, Tom LoBianco, and Brian Eason, "Gov. Mike Pence signs RFRA fix," *Indianapolis Star* (Apr. 2, 2015), http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920/ (viewed Apr. 2, 2015).

and balkanizing our Nation. In the context of an economic regulation, the Court observed:

> a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. *Oklahoma*, 441 U.S. 322, 325-26 (1979). *See also Granholm v. Heald*, 544 U.S. 460, 472 (2005); *Pagan v. Dubois*, 884 F. Supp. 25, 27 (D. Mass. 1995) ("This Court believes this class suit reflects a creeping 'balkanization' of American society into contending ethnic splinter groups which, if allowed to continue, will tear apart the cohesiveness of our social fabric ....").

It is perhaps more difficult today to maintain unity among the more than 300 million Americans in 50 states, in the absence of a common foreign enemy, than it was back in 1787 when the country was much smaller and held together by foreign threats. Any attempt by the Court to impose its own view of marriage on the entire Nation now would have a dangerously divisive effect similar to that caused by *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

In 1857, as now, there were sharp regional differences over a fundamental social issue. But rather than allow Congress to sort the disputes out, the Supreme Court overstepped its bounds and

attempted to dictate one solution nationwide about slavery. That poured fuel on the fire, as history teaches. Likewise, any ruling by the Court here that attempts to establish homosexual marriage for every region of our country, thereby declaring that the local voters are wrong, their political leaders are wrong, and the Bible is wrong about marriage, will have a badly fractious effect.

Thomas Jefferson logically observed that usurpation by the federal government of state jurisdiction would not unite our Nation, but divide it. In 1825, he explained in another context that "the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States" would result in a choice between "two evils" of "dissolution of our Union ... or submission to a government without limitation of powers. Between these two evils, when we must make a choice, there can be no hesitation" in choosing the former, he wrote. Letter of Thomas Jefferson to William B. Giles (Dec. 26, 1825).[3]

Tragically, already some regions of our Nation are retaliating against others for protecting businesses against inevitable litigation that would result from a constitutional right to homosexual marriage. The enormously divisive impact that such a ruling would have is already being felt, as discussed below, and would severely worsen.

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[3] http://oll.libertyfund.org/titles/jefferson-the-works-vol-12-correspondence-and-papers-1816-1826#Jefferson_0054-12_453 (viewed Apr. 3, 2015).

A. Court-Imposed Homosexual Marriage Has Caused Regional Conflict Against Indiana, Including Bans on Official Travel to the State.

The People of Indiana, as in Texas, have opposed homosexual marriage and passed a law to prohibit it. But, unlike Texas, Indiana has been compelled to issue homosexual marriage licenses, beginning in 2014.

In March 2015, the Indiana legislature passed a law that protects businesses from having to act in ways that infringe on their religious liberty. This law, Senate Bill 101, enabled businesses to decline, for example, to participate in homosexual marriage ceremonies. No one seriously doubts the sovereign authority of the Indiana legislature to enact this law, which is similar to, but broader than, the federal Religious Freedom Restoration Act (RFRA) and religious liberty laws in effect in 20 other states.

But the passage of this law amid federal court rulings mandating homosexual marriage has sparked the largest regional conflict in our Nation in decades. Within days, numerous states and cities in the northeast and the west announced bans on official travel to Indiana, in order to punish it for protecting religious liberty against homosexual marriage:

> The list of cities and states banning government-funded travel [to Indiana] continues to grow. Governors in Connecticut, New York, Washington state and Vermont have barred

> travel over the law, along with mayors in New York City, San Francisco, Seattle, Portland, Denver and Washington, D.C.

Associated Press, "Businesses, performers boycott Indiana because of new law" (Apr. 2, 2015).

This balkanization is caused by imposing homosexual marriage on regions of the Nation which oppose it; this cause-and-effect is admitted by legal commentators. Erwin Chemerinsky, Dean of the University of California Irvine School of Law, described the Indiana law as a reaction to the expected ruling by this Court in these consolidated marriage cases:

> There is a widespread consensus across the political spectrum that the Supreme Court is about to recognize a right to marriage equality for gays and lesbians and hold that state laws prohibiting homosexual marriage violate the Constitution. ***This [Indiana] law appears to be a reaction to that development.***

Erwin Chemerinsky, "3 factors that make Indiana's religion law different from other states'," *L.A. Times* (Mar. 31, 2015) (emphasis added).[4]

Similarly, in Michigan, where legislators have considered passing a law similar to Indiana's, the *Detroit Free Press* attributes the motivation for these

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[4] http://www.latimes.com/opinion/op-ed/la-oe-0331-chemerinsky-indiana-religion-law-20150331-story.html (viewed Mar. 31, 2015).

laws to be defense against federal court rulings that require homosexual marriage:

> Indiana's law, like a similar initiative introduced in the Michigan Senate, comes on the heels of a series of federal court decisions striking down state bans on same-sex marriage. ...

Brian Dickerson, "Indiana licenses discrimination, but at a high price," *Detroit Free Press* (Mar. 31, 2015).[5]

The disunity will greatly worsen if the Court rules that Texas and other southern states must begin performing homosexual marriage. Far from unifying the Nation, as some argue, such a Court ruling would have a divisive effect similar to that of the *Dred Scott* decision. The *Dred Scott* Court felt that by imposing its view of slavery on the entire Nation, the Court was resolving the conflict. In fact, of course, the decision made the conflict far worse. Likewise, any ruling by the Court that imposes homosexual marriage on Texas and every corner of the United States would cause vastly more conflict, along regional lines.

The Texas legislature meets in a biennial session that will have adjourned prior to the rendering of a decision by the Court in these cases. But the Texas governor may call a special legislative session, as

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[5] http://www.freep.com/story/opinion/columnists/brian-dickerson/2015/03/31/indiana-law-scaring-employers/70699572/ (viewed Mar. 31, 2015).

Governor Rick Perry did twice in 2013 in order to enact pro-life legislation. Texas and other regions of our Nation remain overwhelmingly on the side of the biblical view of marriage, and that view will not change due to a ruling by the Court. The many thousands of schools, churches and religiously led businesses in Texas and other regions will require protection from litigation that would result from a decision imposing homosexual marriage nationwide, thereby sparking more travel bans as have already begun with respect to Indiana.

B. Homosexual Marriage Imposed by Federal Courts Threatens Our Federalism, as the Alabama Conflict Illustrates.

The harm to federalism caused by federal court overreaching about marriage has already been seen in Alabama. A federal district court ruled in favor of homosexual marriage, fracturing federalism and causing fault lines that persist. *Searcy v. Strange*, 2015 U.S. Dist. LEXIS 7776 (S.D. Ala. Jan. 23, 2015). The Alabama Supreme Court subsequently held, as is its authority, in favor of traditional marriage and quoted this Court for support:

> "[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting

> in and springing from union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Murphy v. Ramsey, 114 U.S. 15, 45, 5 S. Ct. 747, 29 L. Ed. 47 (1885).

Ex parte State ex rel. Ala. Policy Inst., 2015 Ala. LEXIS 33, 18 (Ala. Mar. 3, 2015). The Alabama Supreme Court traced its case law back for nearly 150 years in complete support of its decision.

Justice Kennedy has written, "As all recognize, essential considerations of federalism are at stake here. The federal balance is a fragile one, and a false step" can have enormously devastating consequences. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287 (1993) (Kennedy, J., concurring). The essential comity underlying our fragile system of federalism could completely disappear if there is an overreaching decision by the Court to establish a new constitutional right to homosexual marriage.

C. Ruling Against the Bible by Declaring a Fundamental Right to Homosexual Marriage Would Divide Our Nation.

The Bible is perhaps the most unifying force of our Nation. Among Americans, 79% consider the Bible to be sacred or holy, and 50% feel the Bible contains everything they need to know to live a

meaningful life.[6] In contrast, only about 36% of eligible voters cast ballots in the most recent federal election (2014), which was the lowest turnout in more than 70 years despite massive amounts of political media and campaign spending.[7] No other book or event unifies Americans as much as the Bible, and that unity helps bind our vast and diverse Nation together.

A Supreme Court ruling that endorses homosexual marriage would directly conflict with clear teachings in both the Old and New Testaments. *See, e.g.*, Genesis 2:24 ("Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh.") and Mark 10:6-8 ("But from the beginning of creation, 'God made them male and female.' 'Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh.'") (ESV). In essence, the Court would be rejecting the Bible as false, and by implication perhaps even disparaging the Bible as hate speech. Whether the large percentage of Americans who respect the Bible would be persuaded by such a ruling remains to be seen. But if they are persuaded, then the results would be disastrous for

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[6] The State of the Bible (2014) http://www.americanbible.org/uploads/content/state-of-the-bible-data-analysis-american-bible-society-2014.pdf (viewed Mar. 31, 2015).

[7] Peter James, "Voter turnout continues to be woeful," *Daily Record* (Wooster, Ohio) A4 (Dec. 6, 2014).

the unity of our Nation, because it would weaken the strongest link that holds our society together.

II. A RULING CREATING A NEW CONSTITUTIONAL RIGHT TO HOMOSEXUAL MARRIAGE RUNS THE RISK OF NON-ENFORCEMENT, AND MARGINALIZATION OF THE COURT.

The Republican Party is unlikely to support enforcement of a court ruling creating a new constitutional right to homosexual marriage, as history repeats itself. In 1856, the newly formed Republican Party repudiated both slavery and polygamy in the territories, calling them the "twin relics of barbarism." *Society of Separationists v. Whitehead*, 870 P.2d 916, 923 (Utah 1993) (quoting platform). A year later, the Supreme Court ruled in *Dred Scott* that the Republican Party was wrong about slavery. The Court thought that it was settling the issue.

Instead, the Executive Branch, subsequently under the control of the Republican Party, declined to enforce the Court's overreach in *Dred Scott*. The Constitution thereby functioned as it was designed to, with one branch of government acting to "check and balance" an overreach in power by another branch of government, the judiciary. The Framers envisioned that the judiciary would be the "least dangerous" branch, subject to the power of the purse in Congress and power of enforcement by the Executive Branch. *The Federalist Papers No. 78* (Hamilton 1788) (Wills Ed. 1982), at 393. Judicial

overreaching on the marriage issue risks a similar non-enforcement by a future Republican-controlled Executive Branch.

Democratic administrations have likewise refused to enforce certain rulings by the Supreme Court. For example, in response to the decision against Georgia in *Worcester v. Georgia*, 31 U.S. 515 (1832), Democratic President Andrew Jackson declared that his Executive Branch would not enforce the Court ruling, which rendered it a dead letter. It was widely reported that President Jackson said, "John Marshall has made his decision; now let him enforce it." In fact, President Jackson's actual words to Brigadier General John Coffee may have been, "The decision of the supreme court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate."[8] The meaning was the same: the Executive Branch would not enforce this Court's order. Georgia then ignored the Court ruling, resulting in a devastating loss in reputation of the Court.

The most recent Republican Party platform (2012) expressly states in its section on "Defending Marriage Against An Activist Judiciary":

> A serious threat to our country's constitutional order, perhaps even more dangerous than presidential malfeasance, is an activist judiciary,

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[8] New Georgia Encyclopedia, *Worcester v. Georgia (1832)* http://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832 (viewed Mar. 31, 2015).

> in which some judges usurp the powers reserved to other branches of government. A blatant example has been the court-ordered redefinition of marriage in several States. This is more than a matter of warring legal concepts and ideals. It is an assault on the foundations of our society, challenging the institution which, for thousands of years in virtually every civilization, has been entrusted with the rearing of children and the transmission of cultural values.

2012 Republican Platform 10.[9]

Comparisons are already being made between these marriage cases and *Roe v. Wade*, 410 U.S. 113 (1973), where the Court unsuccessfully attempted to compel nationwide acceptance of abortion and, some would say, suffered a reputational loss as a result. But the marriage issue is even more far-reaching than *Roe v. Wade*, because marriage is an inherently public act that depends on consent and acceptance by the public. *See* Joseph Story, *Commentaries on the Conflict of Laws Foreign and Domestic* § 111 (3d ed. 1846) ("[M]arriage is a contract *sui generis*, and the rights, duties, and obligations which arise out of it, are matters of so much importance to the wellbeing of the State, that they are regulated, not by private contract, but by the public laws of the State ...."). No business is fined for not participating in an abortion, but businesses will be fined for not providing services

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[9] http://www.presidency.ucsb.edu/papers_pdf/101961.pdf (viewed Mar. 31, 2015).

for homosexual marriages. In addition, *Roe v. Wade* did not split our Nation along regional lines.

Just as a Court ruling that established a constitutional right to polygamy would probably not be enforced by the Executive Branch, thereby undermining the stature of the Court, a ruling by the Court to establish homosexual marriage could be rejected for enforcement by a future Executive Branch. The Court should avoid overstepping state jurisdiction on marriage, and thereby steer clear of the real possibility of the Executive Branch refusing to enforce an order of the Court.

CONCLUSION

The Court should avoid the balkanization and excessive regional divisions that would result from creating a new constitutional right to homosexual marriage. Federalism is indeed fragile, as Justice Kennedy once observed. The Court should uphold the state marriage laws at issue.

April 3, 2015

Respectfully submitted,

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